UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

HON. DOUGLAS F. McCORMICK, U.S. MAGISTRATE JUDGE

Tentative Ruling on Law & Motion Matter

DATE: April 23, 2015

CASE: Bada Int'l, Inc. v. Chungho Nais, Co., Ltd., SA CV 13-01110-JVS (ANx)

RE: Defendants' Motion for a Protective Order (Dkt. 66)

Defendants ChungHo Nais Co., Ltd. ("Chungho") and Youngdae Jeon (together, "Defendants") move for a protective order preventing Plaintiff Bada International, Inc. ("Bada") from taking the depositions of William Joung and Soonse Lee, Chungho's Chairman and President, respectively. Bada opposes Defendants' motion with respect to Joung.[1]

For the reasons set forth below, Defendants' motion is GRANTED in part and DENIED in part. In light of Bada's non-opposition, the Court will issue a protective order preventing Lee's deposition. The Court will not issue the same order to prevent Joung's deposition. Nor will the Court order Bada to comply with the Hague Convention for its depositions of ChungHo's officers and agents.

[1] It does not appear that Bada opposes a protective order with respect to Lee. See Joint Stipulation ("JS") at 18 ("Plaintiff respectfully ask[s] this Court to deny Defendant's motion for a protective order and compel the attendance of Joung to his deposition."). This disconnect between the relief sought by Defendants' motion and Plaintiff's opposition strongly suggests that the parties did not adequately meet-and-confer as required by Local Rule 37, a suggestion that is only heightened by the Court's review of the parties' fairly brief correspondence on these issues. The parties are cautioned that failures to adequately meet-and-confer in the future before a motion is filed may result in a summary denial.

In their papers, Defendants advance two arguments for why a protective order should issue. First, Defendants argue that Joung is a high-ranking employee of ChungHo and as such Bada must show that he has unique, non-repetitive knowledge in order to warrant taking his deposition. JS at 8-11. Second, Defendants argue that Bada must pursue depositions of non-parties such as Joung under the terms of the Hague Convention. Id. at 4-6.

Whether Joung's Deposition Should Be Allowed

Discovery seeking the deposition of high-level executives creates "a tremendous potential for abuse or harassment" that may require the court's intervention for the witness's protection under Rule 26(c). Apple, Inc. v. Samsung Elecs. Co., Ltd., 282 F.R.D. 259, 263 (N.D. Cal. 2012). This doctrine does not protect such executives in all circumstances. Rather, the Court will consider "(1) whether the deponent has unique first-hand, non-repetitive knowledge of the facts at issue in the case and (2) whether the party seeking the deposition has exhausted other less intrusive discovery methods." Apple Inc., 282 F.R.D. at 263 (internal quotation marks omitted); see also Church of Scientology of Boston v. I.R.S., 138 F.R.D. 9, 12 (D. Mass.1990) ("An exception to this general rule [against depositions of high ranking government officers] exists concerning top officials who have direct personal factual information pertaining to material issues in an action . . . [and] where the information to be gained . . . is not available through any other source.").

Moreover, when a high-level executive is "removed from the daily subjects of the litigation, [and] has no unique personal knowledge of the facts at issue, a deposition of the [executive] is improper." Celerity, Inc. v. Ultra Clean Holding, Inc., 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007) (internal quotation marks omitted). Additionally, "courts generally refuse to allow the immediate deposition of a high level executive . . . before the testimony of lower level employees with more intimate knowledge of the case has been secured." Google Inc. v. Am. Blind & Wallpaper Factory, Inc., 2006 WL 2578277, at *3 n. 3 (N.D. Cal. Sept. 6, 2006); see also Mehmet v. PayPal, Inc., 2009 WL 921637, at *2 (N.D. Cal. Apr. 3, 2009) ("[Courts] generally refuse to allow the immediate deposition of a high-level executive, the so-called 'apex deponents,' before the depositions of lower level employees with more intimate knowledge of the case.") (emphasis in original). In sum, while a party opposing a deposition "carries a heavy burden to show why discovery should be denied," courts may "protect high level corporate officers from depositions when the officer has no first hand knowledge of the facts of the

case or where the officer's testimony would be repetitive." Google, Inc., 2006 WL 2578277, at *3 n. 3 (internal quotation marks omitted).

In opposition to the motion for a protective order, Bada submits a declaration from Edward Park, who is Bada's principal. Park recounts how he had numerous in-person conversations with Joung regarding Bada's business relationship with ChungHo. Park Decl. ¶ 4. He also states that no other person from ChungHo was present during his numerous interactions with Joung. Id. ¶ 12. Bada also argues that no other less intrusive discovery methods will suffice to replicate Joung's deposition testimony about these in-person interactions. JS at 15-16. In response, Defendants argue that Bada's showing that Joung's interactions with Park are relevant is "conclusory" and faults Bada for not showing "how . . . Joung has any personal, unique knowledge regarding any of [Bada's] allegations in its complaint." Defts' Supp Memo at 2.

The Court finds that Bada has demonstrated that Joung has unique, first-hand, non-repetitive knowledge. Although the Court agrees that Bada's showing is not a model of specificity, the topics implicated by Park's declaration as being within Joung's personal knowledge are well within the fairly broad allegations contained in the complaint. Moreover, a fair reading of Park's declaration leads to the conclusion that Joung was not just a participant but at times the only participant in ChungHo's dealings with Park/Bada. It thus appears to the Court that Bada has satisfied its burden of showing that a deposition of Joung is warranted.

The Court also finds that there are no less intrusive discovery methods available to Bada. It does not appear to the Court that Bada noticed Joung's deposition for the purpose of harassment. Nor is there any indication that Joung's deposition would be repetitive or cumulative of other testimony, especially where it appears that Joung and Park were the only participants to a conversation. The Court accordingly finds that the so-called "apex" deposition doctrine does not provide an adequate basis for a protective order.

Hague Convention

Additionally, Defendants argue that a protective order should issue because Bada is "required" to pursue Joung's deposition under the Hague Convention. JS at 5.

The Court does not agree. Defendants' contention that Joung is a "non-part[y]" is misplaced. Bada noticed Joung's deposition as an officer, director, or managing agent of ChungHo under Rule 30(b)(1). JS at 6; see also Hong Decl. Exh. C at 2 ("as an officer, director, or managing agent of Defendant"). As such, Bada is entitled to take Joung's deposition—as well as the deposition of any other party-witness—under the Federal Rules of Civil Procedure.

This conclusion is not at odds with the Hague Convention. In Societe Nationale Industrielle Aerospace v. United States District Court, 482 U.S. 522, 536 (1987), the Supreme Court held that the Convention is "a permissive supplement, not a preemptive replacement, for other means of obtaining evidence located abroad." Thus, as one leading treatise puts it, "resort to the Hague Convention is not mandatory for discovery authorized under the federal rules (e.g., for discovery from foreign companies that are parties to an action pending in a federal court)." Schwarzer, Tashima & Wagstaffe, Fed. Civ. Pro. Before Trial ¶ 11:1272 (2014 rev. ed.). Thus, where a deposition is sought from a party-affiliate witness such as Joung, "[s]ervice of a deposition notice is effective by itself to compel such persons to attend and to testify." Id. ¶ 11:1281. Accordingly, the Court does not find that the Hague Convention provides a basis for a protective order.

This leaves open the question of where Bada's deposition of ChungHo's officers and agents should occur. Although that issue is not squarely presented by Defendants' motion, the general rule provides that depositions of a defendant corporation's officers and agents should take place at its principal place of business. Here, however, Defendants have argued that depositions in South Korea can only occur under the terms of the Hague Convention, an avenue the Court finds Bada is not required to utilize. The Court would accordingly be inclined to order Defendants to make their witnesses available within the Central District of California, absent a counter-proposal that avoids the restrictions of the Hague Convention.